

NO. 51801-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RONALD ARTH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly refused appellant's proposed self-defense instruction. CP 8-11 (Appendix).

2. The court's instructions did not adequately inform the jury of the law or permit appellant to argue his theory of the case.

Issue Pertaining to Assignments of Error

Appellant was charged with malicious mischief based on allegations that he struck the complaining witness's car with his fists following a verbal altercation in a gas station parking lot. Appellant testified he struck the car in an effort to defend himself, and only after the complaining witness had run into him with the car. A second witness testified that appellant hit the car with his fists after the complaining witness tried to run his car into the appellant. Where appellant presented evidence that he struck the car because he reasonably believed he was in imminent danger of bodily harm, does the court's refusal to instruct the jury on self-defense require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

On July 12, 2003, the King County Prosecutor charged Ronald Arth with first degree malicious mischief. CP 1-4. It was alleged that Arth maliciously caused physical damage to a car by hitting it with his fists, while the driver was inside. CP 1-4; RCW 9A.48.070(1)(a).

A jury trial was held before the Honorable Michael Heavey. The jury returned a guilty verdict. CP 12. The court imposed a standard range sentence

and Arth filed this timely appeal. CP 33-39; CP 40-47.

2. Substantive Facts¹

On February 5, 2002 Dean Savelli, while attempting to leave the Tesoro gas station in Renton, blocked Arth's car from entering. 2RP 28, 158-159; 3RP 22. Savelli and Arth got out of their cars and engaged in a verbal altercation involving the use of profanities and disparaging remarks concerning each other's relative driving abilities. 2RP 29-30, 158-59; 3RP 26-30. The verbal confrontation ended with Savelli getting back into his car.

According to Savelli, when he got back into his car, Arth kicked the side panel and then jumped on the roof and pounded it with his fists. 2RP 32-34. Savelli believed Arth was trying to get into the car in order to hit him, so Savelli put his car in reverse knocking Arth to the ground and drove away. 2RP 33-35. There was over \$1,500.00 damage to the car. 2RP 116-125.

Arth testified that during the argument Savelli threatened him with a gun, and he was afraid Savelli might try to shoot him. 3RP 36. When Savelli finally got back into his car following the verbal dispute, Arth turned and began walking away, thinking the altercation was over. 3RP 30. Savelli, however, put his car in reverse, hitting Arth in the leg. Arth responded by kicking the side panel of Savelli's car. 3RP 30. When Savelli put his car into reverse again, Arth got on the car and hit the car with his fists, fearing Savelli was about to "pin me some place between this building and the car." 3RP 30. Arth told the jury that

¹ The verbatim reports of the court proceedings are referred to as follows: 1RP - 11/6/02; 2RP - 11/7/02; 3RP - 11/12/02; 4RP - 1/31/03.

after being hit by Savelli's car he was scared:

All I could think about was this guy that I had just gotten in an argument with just got in his car, backed it up and hit me with the darn thing. The only thing that was on my mind was him and his car. I beat on it until it moved, and that was it.

3RP 32. Arth said the only reason he hit the car was because he feared Savelli was about to assault him with the car. 3RP 70.

Scott Thiessen, a passenger in Arth's car, testified he saw Savelli intentionally back his car into Arth, hitting Arth's leg. 2RP 161. Thiessen said the car hit Arth after Arth had turned his back on Savelli and was walking away. 2RP 161. Thiessen said he and Arth were both afraid, and he thought Savelli was going to run Arth over with his car. 2RP 162-63.

Arth requested instructions on self-defense. 3RP 78; CP 8-11 (Appendix). The proposed instructions contained the standard for lawful use of force, explained it was the state's burden to prove the absence of self-defense and told the jury a person being attacked had no duty to retreat. Appendix. The state, however, opposed the instructions arguing that because Arth was charged with malicious mischief, self-defense was not available:

I have a general objection to using this instruction at all. I found no case, and I did a pretty lengthy, tried to use as many different combinations of word search where self-defense instruction was used to defend against a charge of malicious mischief, and I found none. *I just don't think that you can have self-defense to a charge of malicious mischief.*

3RP 79 (emphasis added).

Although the trial indicated it would give the defense requested

instructions, 3RP 78, it later agreed with the state and reversed its earlier ruling explaining:

I find that the malice instruction does, WPIC 2.13 gives you [Arth] great opportunity to argue your theory that it wasn't an evil intent to annoy or injure other person, but it was a different intent, a different reaction. And I guess it would be self-defense. *So I think you have the opportunity to argue that there. So I will not give your WPIC 17.02.*

3RP 85 (emphasis added).

C. ARGUMENT

THE COURT'S FAILURE TO INSTRUCT THE JURY ON SELF-DEFENSE REQUIRES REVERSAL.

Each party is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Jury instructions are only constitutionally sufficient if they permit each party to argue its theory and properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The failure to give the proposed defense instructions on self-defense rendered the instructions in this case inadequate. The instructions that were given to the jury did not properly inform the jury on the lawful use of force, the state's burden of proof and there was no duty for a person under attack to retreat. Failure to give the proposed instructions prevented Arth from arguing his theory of the case.

1. The lawful use of force defense is available to a defendant charged with malicious mischief.

The state charged Arth with malicious mischief, a property offense. Arth requested a self-defense instruction on the use of lawful force and the state's burden to prove the absence of self-defense. Appendix. The trial court denied Arth's requested instruction finding that self- defense, as a matter of law,

is not applicable when the crime charged is a property crime. 3RP 81-82.

Where the court finds the defendant is not entitled to an instruction as a matter of law, the standard of review is de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

There is no reported Washington case that holds there is a distinction between crimes against property and persons in the lawful use of force context.

Other jurisdictions, however, have ruled where the facts support the theory the defendant was acting in self-defense, the defense is available where the charge is a property crime.

In Boget v. State, 74 S.W.3d 23 (Tex. 2002), a case strikingly similar to this case, the defendant was charged under Texas law with criminal mischief² for damaging a truck. At trial, the complaining witness testified that Boget approached her truck in a parking lot, began yelling at her, and then broke her windows with a flashlight. A single witness testified that while Boget struck the truck, it was only after the complaining witness tried to run Boget over. Id. at 24-25.

Boget requested a self-defense instruction but his request was denied. On appeal the state argued that self-defense is not available to a defendant charged with a property offense like criminal mischief. The Boget court held, under the facts, Boget was entitled to a self-defense instruction and reversed his conviction. Id.

In reaching its holding, the Boget court engaged in a lengthy analysis of the intent of the Texas self-defense statute. In determining whether the legislature intended that self-defense be available to people charged with criminal mischief, the Boget court turned to the plain language of the Texas self-defense statute. It found the language ambiguous. Boget, 73 S.W.3d at

² The Texas criminal mischief statute reads in relevant part:

Criminal Mischief

(a) A person commits an offense if, without the effective consent of the owner:

(1) he intentionally or knowingly damages or destroys the tangible property of the owner. . . .

Tex. Pen. Code § 28.03.

27.³ The court determined, however, that because the self-defense statute was in the "General Principles of Criminal Responsibility" section of the Texas Penal Code and not the assault and murder sections that evidenced the legislature's intent that the defense not be limited to crimes against persons. Id. at 27-28.

The Boget court also reasoned that to allow instructions on self-defense when a defendant assaults or kills another, but prohibit the defense in crimes involving mere damage to property, was inconsistent with the purposes and principles of self-defense.

For instance, assume a person is about to be run down by a speeding car. If she brandishes her pistol and fires at the front tires of the car to stop the vehicle, she will not receive a charge on self-defense should she be indicted for criminal mischief. On the other hand, if she shoots the driver she is entitled to a charge on self-defense in a murder prosecution. This result is contrary to the object of the statute (self-defense) because it punishes the individual who used the least force possible in self-preservation.

Boget, 74 S.W.3d at 31.

Finally, the Boget court determined there was no logical or legal reason why the right to protect oneself should turn on the state's decision to charge one particular offense or another. Boget, 73 S.W. 3d at 31.

A similar analysis of Washington law leads to the same conclusion reached by the Boget court. The lawful use of force is an available defense to a malicious mischief charge.

First, under the plain language of Washington's lawful use of force

³ The Texas lawful use of force statute reads in part: "a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force." Tex. Pen. Code § 9.31.

statute, self-defense is not limited to crimes against persons.⁴ Under RCW 9A.16.020(3) "[t]he use, attempt, or offer to use force *upon or toward* the person of another is not unlawful . . . [w]hen used by a party about to be injured" (emphasis added). The language of the statute is broad. It makes lawful the use of force either upon a person or toward a person. Additionally, there is nothing in the statute that limits the lawful use of force defense to cases where a defendant is charged with a crime against a person. Thus, under the plain language of the statute, the defense of lawful use of force is available to a person charged with malicious mischief for damaging property if the damage to the property was a result of force directed toward the assailant by the person defending himself.

Second, even if the language of the lawful use of force statute is ambiguous with respect to whether it applies where the charge is malicious mischief, its placement in the criminal code evidences the legislative intent that it not be limited to crimes against persons.⁵ Like the statute in Boget, Washington's lawful use of force statute is found in that section of the criminal code containing all the statutory defenses available to a defendant.⁶ RCW

⁴ Where a statute is clear and unambiguous on its face, its meaning is derived from the wording of the statute itself. Rismon v. State, 75 Wn. App. 289, 291, 877 P.2d 697 (1994).

⁵ Provisions of an act must be considered in their relation to each other, and, if possible, harmonized to insure proper construction of each provision. State ex rel. Royal v. Board of Yakima County Comm'rs, 123 Wn.2d 451, 459, 869 P.2d 56 (1994).

⁶ RCW 9A.16.020 (lawful use of force); RCW 9A.16.060 (Duress); RCW 9A.16.070 (Entrapment); RCW 9A.16.090 (Intoxication).

9A.16. The lawful use of force statute is not only found in the assault or homicide sections of the criminal code. Because the statute is in the same section of the criminal code that contains the statutes governing all defenses, it indicates the legislature intended that the lawful use of force defense apply to all crimes, not just crimes against persons.

Third, allowing the defense of self-defense in property offense cases like this one is consistent with the manifest purpose of the statute and is good policy.⁷ Under RCW 9A.16.020(3), when a person acts in self-defense, the force used must be no more than is reasonably necessary. Thus, when a person reasonably believes it is necessary to use force to protect himself, the law encourages the use of the least force possible. Arth attempted to protect himself from being injured by using force directed toward Savelli by beating on Savelli's car. As the Boget court aptly pointed out, if self-defense is not available in this type of circumstance, the person who uses the least force possible in self-preservation is punished contrary to the purpose of the law which is to allow the use of force in defense but with restraint. Boget, 74 S.W.3d at 31.

Finally, under Washington law assault is defined as either: (1) an attempt, with unlawful force, to inflict bodily injury upon another, accompanied

⁷ A statute is construed so as to carry out its manifest object. See, Roza Irrigation Dist. v. State, 80 Wn.2d 633, 637-38, 497 P.2d 166 (1972), cited with approval in Clements v. Travelers Indem. Co., 121 Wn.2d 243, 254, 850 P.2d 1298 (1993), and Public Util. Dist. 1 v. Public Employment Relations Comm'n, 110 Wn.2d 114, 120, 750 P.2d 1240 (1988).

with the apparent present ability to give effect to the attempt if not prevented or; (2) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm. State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995) (citations omitted). Under the facts here, the state could have charged Arth with assault. Savelli testified he thought Arth was beating on his car in an attempt to get into his car to hit him. 2RP 33. The state argued to the jury that Arth beat on Savelli's car in order to get at him and "beat him half to death." 3RP 104. Thus, the state could have charged Arth with assault under either definition and had it done so the lawful use of force defense would have been available to him. As the Boget court pointed out, there was no logical or legal reason why the right to protect oneself should turn on the state's decision to charge one particular offense or another. Boget, 73 S.W. 3d at 31.

The plain language of the self-defense statute, legislative intent, policy considerations and Washington law lead to the conclusion that self-defense is available where the charge is malicious mischief. As a matter of law, the court improperly ruled Arth was not entitled to a self-defense instruction. This Court should hold, as did the Boget court, that where a defendant is charged with malicious mischief, lawful use of force can be a defense.

2. Arth presented credible evidence that he acted in self-defense entitling him to his proposed instructions on that theory.

The trial court recognized Arth's theory was self-defense and was initially going to instruct the jury on self-defense. 3RP 78. Although the court later determined that self-defense was not available to Arth because he was

charged with a property crime, it subsequently ruled Arth could still argue that theory solely on the intrusions given without any instructions on self-defense. 3RP 85. In ruling that Arth could adequately argue his theory of self-defense under the instructions given to the jury, the court found "compelling" the state's argument that Arth could argue because he was trying to protect himself the state failed to prove the mental elements of malicious mischief. 3RP 81-82, 85. The court was wrong.

A defendant is entitled to a self-defense instruction if he presents some evidence that the alleged criminal act occurred under circumstances amounting to self-defense. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). If there is evidence that the defendant's use of force was based on a reasonable belief that he was about to be injured, the defense is entitled to a self-defense instruction. Riley, 137 Wn.2d at 909; State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983). The threshold burden of production for a self-defense instruction is low. Janes, 121 Wn.2d at 237. The defendant's testimony alone can raise the issue of self-defense sufficiently to require an instruction. McCullum, 98 Wn.2d at 488. Only where the record contains "no credible evidence" will a trial court be justified in denying a request for an instruction. Id.

Here there was a sufficient quantum of "credible evidence" to justify the requested self-defense instructions. Both Arth and Thiessen testified that Arth struck Savelli's car only after Savelli ran into him and was backing up to hit him again. Arth testified he struck the car in an effort to prevent Savelli

from injuring him with his car. 2RP 161-63; 3RP 70. Savelli testified he believed Arth was beating on the car in order to get inside and hit Savelli. Under these facts, a reasonable juror could believe Arth acted in self-defense when he beat on Savelli's car. Thus, Arth was entitled to a self-defense instruction.

Jury instructions on self-defense must more than adequately convey the law. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. Id. at 900; State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984); State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980), *review denied*, 95 Wn.2d 1008 (1981). "Jurors should not have to speculate about [the law], nor should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is." State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158, *affirmed*, 125 Wn.2d 707, 889 P.2d 396 (1995) (citations omitted).

The court's instructions did not make the legal standard of lawful use of force manifestly apparent and they prevented Arth from arguing his theory of the case. The jury was never instructed that lawful use of force was a defense to the charge and that Arth had no duty to retreat.⁸ Arth was forced to try to convince the jury the law allowed Arth to defend himself and that his actions

⁸ No duty to retreat exists when one is assaulted in a place where she has a right to be. State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984). If supported by the facts it is error to refuse to instruct the jury that a defendant has no duty to retreat. Id. at 598. Arth had the right to be at the gas station.

were lawful even though he was angry and beat on Savelli's car for the purpose of annoying, vexing or even injuring Savelli. 3RP 114-115. Without the requested self-defense instructions explaining the lawful use of force and the no duty to retreat standard, the jury could have concluded that while Arth reasonably believed Savelli was trying to run him over and he hit the car to get Savelli to stop, because he did not try to retreat but purposely beat on the car with the intent to annoy or even injure Savelli, he was guilty of malicious mischief.

Moreover, the court's instructions did not make it manifestly apparent the state had the burden of proving the absence of self-defense. Arth's proposed instructions informed the jury that it was the state's burden to prove the absence of self-defense. Appendix A. The court's instructions did not allocate that burden to the state.

A person is guilty of malicious mischief if he *knowingly and maliciously* causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars. RCW 9A.48.070(1)(a). The jury was instructed that a person acts knowingly or with knowledge "when he is aware of a fact, facts, or circumstances or result described by a statute defining an offense." CP 17-30 (instruction no. 6); RCW 9A.08.010(b)(i). The jury was also instructed that "malice" is an:
evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another.

CP 17-30 (instruction no. 7); RCW 9A.04.110.

In State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984), Acosta was charged with second degree assault. Under the assault statute, the state was required to prove Acosta knowingly inflicted grievous bodily harm. Id. at 616. Thus, knowledge was an essential element of the crime. Id.

The Acosta court held, that because self-defense is defined by statute as a "lawful act"⁹ it negated the knowledge element. Acosta, 101 Wn.2d at 616. The Acosta court reasoned that it is impossible for one who acts in self-defense to be aware of facts or circumstances described by statute defining an offense. Id. Thus, requiring a defendant to prove the absence of the mental element of knowledge violates due process. Id. at 618.¹⁰ Therefore, it is the state's burden to prove the absence of self-defense beyond a reasonable doubt. Id. at 619.

The same principle applies here. The state was required to prove Arth acted knowingly. If he acted in self-defense, it would be impossible for him to be aware of facts or circumstances described by the malicious mischief statute defining that offense.

Similarly, because self-defense is defined by statute as a "lawful act" it would be impossible for someone acting in self-defense to also be acting with malice. Malice is an act "done in willful disregard of the rights of another" and

⁹ RCW 9A.16.020(3).

¹⁰ The due process clause of the fourteenth amendment to the United States Constitution requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

an act that is done in willful disregard of the rights of another is not a lawful act.

In sum, Arth presented sufficient evidence to entitle him to his proposed self-defense instructions. Although the court ruled Arth could argue self-defense under the instructions given to the jury, the court's instructions did not make the self-defense standards manifestly apparent. The jury was not told lawful use of force was a valid a defense, that Arth had no duty to retreat or that the state had the burden to prove the absence of self-defense. The court erred in failing to give Arth's proposed self-defense instruction.

3. The failure to instruct the jury on self-defense was not harmless.

An error affecting a defendant's self-defense claim is constitutional in nature and cannot be deemed harmless unless it is harmless beyond a reasonable doubt. State v. Kidd, 57 Wn. App. 95, 100, 101, 786 P.2d 847, n.5, *review denied*, 115 Wn.2d 1010, 797 P.2d 511 (1990) (citing State v. McCullum, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983)). Jury instructions misstating the law of self-defense is an error of constitutional magnitude and is presumed prejudicial. LeFaber, 128 Wn.2d at 900.

Here, there was more than just a misstatement of the law of self-defense. The jury was never properly instructed on the law of self-defense. As shown above, even if the jury agreed that Savelli assaulted Arth with his car and that Arth believed Savelli was going to injure him, under the instructions it was given, it had little choice but to convict because it was not told Arth was entitled to use force to protect himself and that he had no duty to retreat. Further, under these facts, had the jury been properly instructed that it was the state's burden to prove the absence of self-defense, it is likely jurors would have concluded the state failed to meet that burden. The error was not harmless beyond a reasonable doubt. Thus, Arth's conviction must be reversed.

D. CONCLUSION

As a matter of law, the defense of self-defense is available to a defendant charged with malicious mischief. Arth presented sufficient evidence that he was acting in self-defense to entitle him to self-defense instructions. The court's refusal to instruct the jury on self-defense was not harmless. This Court must reverse Arth's conviction and remand for a new trial.

DATED this _____ day of July, 2003.

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